THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

N0. 01-S-1141

STATE OF NEW HAMPSHIRE

V.

CINDY GRANT-CHASE

OPINION AND ORDER

LYNN, J.

The grand jury returned an indictment against the defendant alleging that on or between May 7 and May 17, 2001, she:

> did purposely commit the crime of criminal solicitation of the crime of criminal solicitation to murder in that, acting with the purpose that another commit the crime of Criminal Solicitation to Murder, Cindy Grant-Chase did solicit and/or request another person to engage in conduct constituting the crime of Solicitation to Murder, in that Cindy Grant-Chase solicited and/or requested Carol Carriola to contact, on behalf of Cindy Grant-Chase, hired killer(s) to arrange for the murder of Cheryl Ciccone by said hired killer(s) in exchange for a fee promised by Cindy Grant-Chase.

The State asserts that this indictment properly charges the defendant with the crime of criminal solicitation, in violation of RSA 629:2 (Supp. 2001). The defendant, however, moves to dismiss the indictment on the grounds that its plain language charges not the solicitation of a crime but merely a "solicitation of solicitation," which does not constitute a crime. Alternatively, the defendant argues that if solicitation of solicitation does fall within the reach of RSA 629:2, the statute is

unconstitutionally overbroad because of its chilling effect on free speech rights. I reject both of defendant's arguments, and therefore deny the motion to dismiss.

RSA 629:2, I provides that a person is guilty of criminal solicitation if, "with a purpose that another engage in conduct constituting a crime, he commands, solicits or requests such other person to engage in such conduct." The fundamental flaw in defendant's first argument is that it fails to recognize that in order to be found guilty of criminal solicitation, it is not necessary that the solicitor intend that the person solicited will personally perform the criminal act solicited. RSA 629:2 is based upon 5.02 of the Model Penal Code. The Official Commentary to that section states, in pertinent part:

> (ii) Solicitation of Conduct Establishing Complicity
> Under prior law there was support for the view that soliciting A to solicit B to commit a crime is itself criminal, as is soliciting another to take part in a conspiracy. Liability would clearly be imposed under Subsection (1), since in both instances the person solicited was being asked to take steps that would make him a party to the completed crime were it committed.
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> . . . Under the present section, if the party solicited is asked to render such aid as would make him a party to the completed substantive crime . . ., the solicitation itself is criminal.

American Law Institute, Model Penal Code and Commentaries (hereinafter "Commentaries") 5.02, at 374-75 (1985).

Under RSA 626:8 (Supp. 2001), a person is guilty of the substantive offense of murder if she is an accomplice to the murder, that is, if "with the purpose of promoting or facilitating

the commission of [murder], she solicits [another] person in committing it, or aids or agrees or attempts to aid such other person in planning or committing it." RSA 626:8, III(a). Thus, by alleging that the defendant solicited Carriola "to contact . . . hired killer(s) to arrange for the murder of Cheryl Ciccone," the indictment charges that the defendant requested conduct from Carriola that would have made the latter an accomplice to murder if the murder had been carried out. Such conduct by the defendant, if proved, constitutes the offense of criminal solicitation of the crime of murder in violation of RSA 629:2.

The case law also offers no support for the view that the offense of criminal solicitation is limited to efforts by the solicitor to have the person solicited personally commit the crime which is the object of the solicitation. Although the case dealt with the crime of attempt rather than solicitation, the court's analysis in State v. Kilgus, 128 N.H. 577 (1986) is instructive. In that case the court upheld the defendant's conviction for attempted murder based on an indictment which could be "fairly read as alleging that Kilgus hired Chasse to `purposely cause the death of Paul Labonville,' and that Chasse could have `purposely cause[d]' Labonville's death either by directly killing Labonville himself or by arranging for another to kill him." Id. at 585 (emphasis added). Indeed, since the main issue with respect to the attempt charge in Kilgus was whether the defendant's solicitation of Chasse to have "people in Boston" kill the victim

amounted to the "substantial step" sufficient to impose liability for the crime of attempt, and since the offense at issue here, solicitation, need not involve conduct that proceeds to the point of a substantial step toward commission of the substantive crime, Kilgus' recognition that the person solicited need not be the one who will personally commit the substantive offense would appear to apply a fortiori to this case. See also State v. Furr, 235 S.E.2d 193, 199 (N.C. 1977) ("Whether defendant solicited Huneycutt to commit the murder himself or to find another to perpetrate the crime is . . . of no consequence; either act is a crime in this state.").

The defendant next argues that the indictment must be dismissed because her conduct is constitutionally protected. The defendant cites Brandenburg v. Ohio, 395 U.S. 444 (1969), for the proposition that the constitutional guarantee of free speech "do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action." Id. at 447. She also contends that under Gooding v. Wilson, 405 U.S. 518 (1972) and Lewis v. New Orleans, 415 U.S. 132 (1974), she may challenge RSA 629:2 on overbreadth grounds even if her own conduct is not constitutionally protected. The short answer to these various assertions is that the conduct alleged here is a far cry from the "opprobrious language" violation charged in Gooding, the "mouthing

off" to a police officer at issue in Lewis, or the abstract advocacy of future violence with which the Brandenburg Court was concerned.

The drafters of the Model Penal Code recognized that there could be instances when activity falling within the reach of a criminal solicitation statute would approach the boundaries of protected speech, but they concluded that the offense should exist nonetheless because no danger of infringing legitimate speech would be present in instances involving solicitations to commit "ordinary crimes:"

> Apparently the Supreme Court does believe that even direct incitement of specific illegal acts enjoys some constitutional protection, perhaps because such incitement expresses most eloquently the intensity of opposition to hated laws or policies, and because speakers should not have to fear that whenever they slip from general advocacy to advocacy of specific illegal acts they will be subject to criminal punishment. It would be difficult to make similar arguments about private solicitations to commit ordinary crimes made on wholly nonpolitical grounds and it seems unlikely that the Supreme Court meant to afford protection is such cases.

Commentaries 5.02, at 378 (emphasis added).

The case law bears out the accuracy of the drafters' assessment. For example, in Brown v. Hartledge, 456 U.S. 45 (1982), Justice Brennan explained that

> [W]hile a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact on the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited.

Id. at 55. See also Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 244 (4th Cir. 1997) ("[E]very court that has addressed the issue, including this one, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of spoken or written words."); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself."); Laurence H. Tribe, American Constitutional Law 837 (2d ed. 1988) ("[T]he law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of Volkswagen parts.").

As Brandenburg makes clear, the dividing line between that speech which is protected and that which may form the basis for criminal prosecution is the distinction between abstract advocacy of indiscriminate measures versus the concrete solicitation of specific acts. Two factors are important in this analysis: the imminence of the action requested, and the likelihood of producing the requested result. Courts have recognized that the more harmful or antisocial the conduct solicited, the greater the state's interest in preventing such conduct and, consequently, the more expansive may be the idea of imminency. See, e.g., People v. Rubin, 158 Cal. Rptr. 488, 493 (Cal.App. 1979) ("Murder, the most serious crime of all, carries the longest time span of any crime

[for solicitation purposes], as shown by the lack of time limitation on its prosecution.").

At oral argument, the State represented that its proof would show that, at the time of the offense, the defendant and Carriola were incarcerated together at the state prison for women; that the defendant apparently believed Carriola (who was a transfer inmate from New Jersey serving a sentence for a RICO offense) had organized crime connections; and that the defendant offered Carriola $5,000.00 to arrange for someone to kill the wife of Bruce Ciccone, a New Hampshire Probation Officer with whom the defendant was having an affair. Assuming the State is able to prove these facts, there is no possible way that such conduct on the part of the defendant would be protected by the free speech guarantees of the state or federal constitutions. See United States v. Rahman, 189 F.3d 88, 117 (2d Cir. 1999), cert. denied, 528 U.S. 982 (2000) (rejecting First Amendment challenge to defendant's conviction for, inter alia, solicitation of attacks on U.S. military installations and murder of Egyptian President Hosni Mubarak); Sheeran v. State, 526 A.2d 886, 891 (Del. 1987) (freedom of speech not violated by defendant's conviction for soliciting arson).

For the reasons stated above, the defendant's motion to dismiss is hereby denied.

BY THE COURT:

February 8, 2002

ROBERT J. LYNN
Associate Justice